BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHAWN MOORE	)	
Claimant	)	
VS.	)	
	)	
VENTURE CORPORATION	)	
Respondent	)	Docket No. 1,058,339
AND	)	
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 29, 2013, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on September 10, 2013.

APPEARANCES

Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated the exhibits introduced at Phillip Barnes' deposition, but not offered into the record, were considered by the ALJ and are part of the record. The parties also agreed respondent was contesting whether claimant sustained an accident arising out of his employment with respondent.

ISSUES

This is a claim for an October 15, 2011, right knee injury by accident. ALJ Fuller denied claimant's request for compensation, finding claimant failed to prove his injury arose out of and in the course of his employment and failed to prove his reported accident was the prevailing factor causing his injuries and resulting need for treatment.

Claimant contends his injury arose out of and in the course of his employment with respondent and the day-to-day activity exclusion of K.S.A. 2011 Supp. 44-508(f)(3)(A)(i) does not apply. He argues his injury occurred while he was performing an activity connected to and inherent in the performance of his job. Claimant contends he proved his work accident was the prevailing factor causing a new injury to his knee and his need for treatment and the resulting impairment. Claimant asserts his accidental injury resulted in a new physical finding or change in the physical structure of his body.

Respondent contends claimant did not sustain an accident,[1] nor did the accident arise out of his employment. Respondent asserts claimant's alleged accident was not the prevailing factor causing any lesion or change in the physical structure of his right knee and that claimant's knee condition is the result of either an activity of daily living, a personal risk, a neutral risk or arose from an idiopathic cause. Should the Board find claimant's knee injury is compensable, respondent submits claimant sustained a 15% right lower extremity functional impairment.

The issues before the Board on this appeal are:

1. Did claimant sustain an accident on October 15, 2011? Respondent asserts that the definition of an accident as set forth in K.S.A. 2011 Supp. 44-508(d) requires that the accident must be the prevailing factor causing claimant's injury.

2. If so, did claimant's accident arise out of his employment with respondent? Specifically:

A. Was claimant's accident the prevailing factor causing his injury, disability and need for medical treatment?

B. Was claimant's injury the result of a normal activity of day-to-day living?

C. Did claimant's accident or injury arise out of a neutral or personal risk with no particular employment or personal character?

D. Did claimant's injury arise directly or indirectly from an idiopathic cause?

E. Did claimant's accident merely aggravate, exacerbate or accelerate a preexisting condition?

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[1] The Award indicates the parties stipulated that claimant met with personal injury by accident on October 15, 2011, in Phillips County, Kansas. At pages 4-5 of the regular hearing transcript, respondent admitted claimant was injured on October 15, 2011, but in its brief and at oral argument denied claimant sustained an accident, as K.S.A. 2011 Supp. 44-508(d) requires the accident to be the prevailing factor causing claimant's injury.

3. If claimant sustained a personal injury by accident arising out of and in the course of his employment with respondent:

A. Is claimant entitled to temporary total disability benefits?

B. Is claimant entitled to reimbursement of medical mileage and medical expenses?

C. Should respondent be liable for claimant's unpaid related medical expenses?

D. What is the nature and extent of claimant's disability?

E. Did claimant prove he is entitled to future medical treatment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant was employed by respondent as an equipment operator. He testified that on October 15, 2011, he was operating a backhoe and as he was stepping off the backhoe he felt a pop in his right knee. Claimant took two more steps and pain hit him. On cross-examination, claimant testified he was stepping down from the bottom step of the backhoe, which was approximately one and one-half feet off the ground. He stated, ". . . the pain hit me after I got off the backhoe but I felt the pop as my foot hit the ground, but it, you know, took two steps for me to actually feel all the pain."[2] Claimant was not asked why he got off the backhoe, or why he was walking around the backhoe.

Claimant testified he finished the shift and sought medical treatment the following Monday with respondent's physician in Hoisington, Kansas. An MRI revealed a torn ACL and meniscus. Claimant's right knee was surgically repaired by Dr. Erik L. Severud. The surgery was paid for by claimant's private health insurance. Claimant testified that prior to the incident on October 15, 2011, he had no issues with his right knee.

Rachel E. Pratt, a claims adjustor with Travelers Insurance, testified she interviewed claimant on October 24, 2011, and made a recording of the interview. A typewritten transcript of Ms. Pratt's interview with claimant was prepared. Based in part upon the interview, Ms. Pratt denied the claim. The following are excerpts from the transcription:

Q. What happened?

A. I just twisted my knee.

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[2] R.H. Trans. at 20.

Q. And what were you doing?

A. Walking. I INAUDIBLE . . .

Q. Where were you coming from? I mean, I, I . . . if you could just

INAUDIBLE . . .

A. I, I, well, I mean, I was j- . . . I was just at work. I was getting off of a backhoe, and I walked around in front of the backhoe and, and that's, it just, I almost hit the ground. It just hurt.

Q. So, you were just . . .

A. And it . . .

Q. . . . walking? Did you slip over anything? Anything INAUDIBLE . . .

A. No, didn't step over anything, didn't step in a hole. I d- . . . I don't think that I turned wrong. I, I guess I might've twisted wrong. I don't know.[3]

On October 17, 2011, claimant was examined by Phillip D. Barnes, physician assistant for Dr. Nathan Knackstedt. Mr. Barnes' notes from that visit indicated claimant got off a piece of construction equipment, walked around it and developed acute right knee pain. According to Mr. Barnes, claimant denied sustaining the right knee injury when getting off the machine. Mr. Barnes admitted he was relying on his notes and did not remember his encounter with claimant. Mr. Barnes saw claimant on two occasions and indicated claimant was never seen by Dr. Knackstedt.

In response to a letter dated December 8, 2011, from respondent's attorney, Mr. Barnes and Dr. Knackstedt answered yes to the following: "In my medical opinion, the claimant's activity as described of walking around a piece of equipment and developed acute right knee pain is not the prevailing factor in Mr. Moore's need for medical attention."[4]

On March 12, 2012, ALJ Fuller ordered claimant to undergo an independent medical examination by Dr. Paul C. Pappademos of Advanced Orthopaedic Associates, P.A. For unknown reasons, claimant was evaluated on July 2, 2012, by Dr. Kenneth A. Jansson, another orthopedic specialist at Advanced Orthopaedic. Dr. Jansson's IME report indicated claimant "claims that on 10/15/2011, he twisted his knee as he was stepping back

[3] Pratt Depo., Ex. 1 at 3.

[4] Barnes Depo., Ex. 3 at 2.

off of a machine and had swelling and pain."[5] Dr. Jansson also stated in the IME report, "I think it is in my opinion, far more likely than not, that this ACL injury occurred at the time of the injury on 10/15/2011 and that the procedure should be covered under Workers' Compensation as the prevailing factor."[6] Dr. Jansson testified that he does not review a patient's prior medical records before meeting with them, as the records might bias him.

Dr. Jansson did not recall whether he reviewed claimant's medical records after meeting with him to check the mechanism of injury. After reviewing a transcript of Ms. Pratt's interview with claimant, Dr. Jansson steadfastly continued to opine claimant's right knee injury was work related:

> Q. (Mr. Burnett) So the top line says so you were just walking.
>
> A. (Dr. Jansson) Well, reading through his testimony here -- and you know, patients aren't always the best historians, because I get patients telling me all sorts of stuff. I had a patient tell me their kneecap flipped out of place and went all the way across the room, which I know obviously didn't happen.
>
> But clearly something happened to this guy's knee on the 15th of October of 2011, and at the time we're talking about he had a confirmed injury to his ACL and, you know, I don't see anything else in his history that would explain it any better than what he's describing because that's when his symptoms started. So that would all be consistent in my mind, in my opinion.
>
> Q. So it matters little to you that he's walking versus stepping off of a backhoe.
>
> A. It matters very little to me the actual semantic words that he chooses to use in his sentence describing that some injury occurred to him on that day and that time.[7]

Dr. Jansson indicated claimant had an unusual amount of instability not usually associated with an acute ACL tear. Nevertheless, Dr. Jansson opined claimant's torn right knee ACL was acute and not the result of a chronic condition:

> In this guy's case, he does have evidence of acute pathology. I mean, you know, he did do something to his knee. It's not that -- you know, it's not chronic degenerative change. He actually has a meniscus tear and an ACL tear.[8]

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[5] Jansson Depo., Ex. 2 at 1.

[6] *Id.*, Ex. 2 at 2.

[7] *Id.* at 20-21.

[8] *Id.* at 31.

Dr. Jansson also testified it was his understanding that things that happen at work are work related and things that do not happen at work are not work related. However, he also indicated that the context in which the work activity was performed probably makes some difference as to whether the injury was work related.

At the request of respondent, claimant was evaluated by Dr. John P. Estivo on January 4, 2013. Dr. Estivo noted claimant was 6 feet tall and weighed 291 pounds. Dr. Estivo's report indicated claimant gave the following history:

> He states that on 10/15/2011 he stepped out of a backhoe. He states he held onto a railing and stepped down to the ground with his right foot. He states he then stepped down to the ground with his left foot. He states to me he did not twist his right knee at that time. He states that as he walked around the equipment he then experienced a sudden pop and pain in his right knee.[9]

Dr. Estivo's report went on to say:

> The patient continues to deny experiencing any twisting or pivoting injury to the right knee on 10/15/2011. The patient is excessively overweight, and this certainly is a major contributing factor to his knee injury. Considering the fact that this patient did not experience any pivoting or twisting injury to the right knee on 10/15/2011, it would be my medical opinion that the ACL tear to the right knee is not a result of the incident of 10/15/2011. I would agree with Dr. Knackstedt in that the prevailing factor regarding this patient's right knee ACL tear would not be the incident of 10/15/2011. Dr. Jansson did state in his IME that considering the degree of instability demonstrated initially with this patient's right knee, one would not commonly see that degree of instability with a fresh ACL tear. I think it is much more likely that this patient had been dealing with a chronic ACL tear to the right knee that then became symptomatic with the simple act of walking.[10]

Claimant, at the request of his counsel, was evaluated by Dr. Pedro A. Murati on August 27, 2012. Claimant gave a history of stepping down from a backhoe, turning his body and feeling a pop and immediate pain in the right knee. Dr. Murati physically examined claimant and his report indicated that he reviewed the medical records of Advanced Orthopaedic (Dr. Jansson), Pinnacle Sports Medicine (Dr. Severud) and Clara Barton Hospital. However, Dr. Murati was provided no radiological films to review and testified that he did not have records from Clara Barton Hospital, including records from Dr. Knackstedt. Dr. Murati opined claimant's torn meniscus and ACL were the direct result of the work-related injury that occurred each and every working day through October 12, 2011, during his employment with respondent.

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[9] Estivo Depo., Ex. 2 at 1.

[10] *Id.*, Ex. 2 at 4.

Dr. Jansson was not asked for an opinion on claimant's functional impairment. Dr. Estivo opined claimant had a 17% functional impairment of the right lower extremity, while Dr. Murati assigned claimant a 27% functional impairment of the right lower extremity. Drs. Estivo and Murati testified they utilized the *Guides*[11] in formulating their functional impairment opinions.

ALJ Fuller found:

> It is clear that the claimant had a torn ACL and a torn meniscus. The claimant's history of injury is not as clear. He initially gave a history of feeling pain as he walked around a piece of equipment, stating that he did not injure his knee when he got off of the equipment. He told Dr. Jansson that he had twisted his knee as he was stepping back off of a machine and had swelling and pain. Subsequently, the mechanism of injury was that when he got off of the equipment, his knee popped. Then he felt pain as he walked around the equipment, (regular hearing testimony). The history given to Dr. Estivo was consistent with the claimant's recorded statement and the statement provided to Mr. Barnes. Upon examination, the claimant was found to have significant instability in the knee. The examining physicians agreed it was unusual to have that much instability after an acute injury.
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> Dr. Knackstedt and Mr. Barnes, initial treating physician and nurse practitioner, opined that the claimant's activity as described is not the prevailing factor in his need for medical attention. Dr. Jansson, the court ordered evaluator, opined that the claimant's work was the prevailing factor because of where the injury occurred. He further stated that it was really impossible to do a completely accurate causation evaluation because he was totally reliant on what everybody else said. Dr. Murati opined that the claimant's current diagnoses were a direct result of the reported work injury. Dr. Estivo opined that the ACL tear or injury to the right knee was not related to the specific injury claimed on October 15th, 2011. He believed the prevailing factor was a pre-existing problem with the knee rather than the reported event, noting that in Dr. Jansson's initial evaluation, the claimant had a considerable degree of instability. This would mean that the ACL ligament was already lax and probably had some degree of tearing prior to the reported event.
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> K.S.A. 44-508(f)(2) *An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.* An injury which arose out of a neutral risk is not compensable. Here, the claimant's injury arose while he was walking. This was how it was reported initially. Walking is a neutral risk, an activity of daily living. Further, after considering all the evidence presented, it is found, due to the

[11] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> significant instability found, that the claimant had a preexisting condition in his knee. The claimant has failed to prove that his injury arose out of and in the course of his employment. He has failed to prove that his reported accident is the prevailing factor causing his injuries and resulting need for treatment.[12]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[13] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[14]

K.S.A. 2011 Supp. 44-508(f), in part, states:

> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

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[12] ALJ Award at 5-6.

[13] K.S.A. 2011 Supp. 44-501b(c).

[14] K.S.A. 2011 Supp. 44-508(h).

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[15]

Respondent seeks to separate claimant's act of stepping out of the backhoe and walking in the grass after stepping down. Respondent argues that claimant injured his right knee by walking on grass after getting off the backhoe and, therefore, claimant's right knee injury occurred while engaged in an activity of normal day-to-day living and was the result of a neutral or personal risk. Claimant contends his right knee injury occurred when he stepped off the backhoe, which is not an activity of normal day-to-day living. Injuring one's knee while stepping off a backhoe is the result of a work risk and is not the result of a neutral or personal risk.

The Board finds that claimant injured his right knee when he stepped off the backhoe. Claimant testified he felt a pop when he stepped off the backhoe, which is the version of events contained in the reports of Drs. Jansson and Murati. Mr. Barnes testified claimant gave a history of feeling pain after taking a few steps on the grass. Claimant told Ms. Pratt he was getting off the backhoe and walked around in front of it when he felt pain and almost hit the ground. Dr. Estivo indicated claimant gave a history of feeling a pop in the right knee as he was walking around the backhoe. From the record, it is impossible to tell if claimant gave different histories to the aforementioned medical providers or if some of them did not accurately record the entire sequence of events. There is nothing in the record to indicate claimant changed his version of events so that his accident would be deemed arising out of his employment with respondent.

Even if claimant injured his knee while walking after he stepped off the backhoe, the Board would find claimant's right knee injury was work related. Respondent is attempting

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[15] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

to isolate the act of walking from the remainder of claimant's job duty of operating the backhoe. In order to operate the backhoe, claimant had to walk to the backhoe, climb into the backhoe and operate it. Claimant's job required him to climb out of the backhoe when finished, for breaks, or to perform another work-related activity, etc., and then walk away from the backhoe. The Board views the act of stepping down and walking as part of claimant's single job task of exiting the backhoe.

Respondent also asserts that claimant's accident was not the prevailing factor causing his right knee injury, claimant's right knee injury was the result of an idiopathic cause and the accident merely aggravated a preexisting condition. The Board finds that the prevailing factor opinion of Dr. Knackstedt is not credible, as he never physically examined claimant. The Board also finds Dr. Estivo's opinions dubitable. In particular, Dr. Estivo's opinion that claimant had a preexisting chronic ACL tear that became symptomatic when walking is dubious. Claimant had no history of right knee problems. Nor did Dr. Estivo indicate that any MRIs, x-rays or other diagnostic tests showed a preexisting ACL tear. Dr. Estivo's opinion is based solely on the degree of instability in claimant's right knee. Even if Dr. Estivo's theory concerning the ACL tear has any weight, it ignores claimant's torn meniscus and the partial medial and partial lateral meniscectomies he underwent. There is nothing in the record to indicate claimant's torn right knee meniscus preexisted the accident.

The Board is mindful that Dr. Murati, who opined claimant had a 27% functional impairment to the right lower extremity, is an expert witness employed by claimant. Nevertheless, he, like Dr. Jansson, found it significant that claimant's right knee symptoms began with stepping off the backhoe.

The Board finds the opinions of Dr. Jansson, the court-appointed physician, to be the most credible. He indicated claimant had a torn meniscus and ACL in the right knee that were acute and not chronic. Dr. Jansson attributed claimant's right knee injury to stepping off the backhoe and twisting his knee. Moreover, Dr. Jansson was a court-appointed physician and unlike Drs. Estivo and Murati, was not a hired expert.

CONCLUSION

Claimant proved he sustained a right knee injury by accident arising out of and in the course of his employment with respondent. Claimant's work accident was the prevailing factor causing his right knee injury, disability and need for medical treatment. His accident was not the result of a personal or neutral risk, nor was his injury the result of an idiopathic cause. Claimant's right knee injury occurred when he stepped off the backhoe and was not the result of a normal activity of day-to-day living.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[16] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses the May 29, 2013, Award entered by ALJ Fuller by finding claimant sustained a right knee injury by accident arising out of and in the course of his employment with respondent. This matter is remanded to the ALJ with instructions to determine whether claimant is entitled to temporary total disability benefits, the nature and extent of claimant's disability, whether claimant is entitled to reimbursement of medical mileage and medical expenses, whether respondent is liable for claimant's unpaid related medical expenses and if claimant proved he is entitled to future medical treatment. The Board adopts the remaining orders set forth in the Award to the extent they are consistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
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Honorable Pamela J. Fuller, Administrative Law Judge

[16] K.S.A. 2012 Supp. 44-555c(k).